Office - Supreme Court, U. S.
FEB 26 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 572

SIMON L. LEVY, CHARLES B. LEVY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON THE PETITION FOR WRIT OF CERTIORARI.

EBEN LESH,
Huntington, Indiana,
WALTER BACHRACH,
231 South La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

JOSEPH H. LESH,
Huntington, Indiana,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Petition for Rehearing	1
Introduction of Testimony on Prior Indictment	2
Instructions of Court on Effect of Nolo Contendere	2
Instructions of Court on Presumption of Criminal Intent	5
The Court Will Take Notice of Slight Errors Where Proof of Guilt is Not Strong	6

Cases Cited.

Glasser v. United States, 315 U. S. 60	6
Hibbard v. United States, 172 Fed. 66	7
Johnson v. United States, 318 U. S. 189	3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 572.

SIMON L. LEVY, CHARLES B. LEVY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION.

Counsel believe that the denial of the petition for certiorari was predicated primarily upon the assertion in the brief of Government (pp. 10, 11) that the errors complained of related to points that petitioners' trial counsel "consciously and intentionally" failed to save, and that such counsel led the trial judge to "understand that counsel was satisfied." We further believe that, as we shall show, the record fails to disclose any such express waiver, but on the contrary the waiver, if any, was inadvertent.

In support of this petition for a rehearing we herewith submit a brief appended hereto and by reference made a part of this petition for rehearing.

BRIEF.

This prosecution was brought in the District Court of the United States for the Southern District of Indiana and the petitioners herein with eight other individuals and two corporations were charged with a fraudulent scheme and the use of the United States mails in its execution.

In the original petition for writ of certiorari, and brief in support thereof filed in this case and to which reference is herein made, the petitioners pointed out certain errors committed on the trial of the case in the District Court, which errors were highly prejudicial to the rights of these petitioners.

These errors related to the attempted introduction of certain testimony regarding a prior case in which the petitioner, Simon L. Levy, was faced with a similar charge to the one described in the indictment herein over fifteen years prior to the date of the present indictment, and in which a plea of *nolo contendere* had been entered, and also in the giving by the court of certain instructions relating thereto. These errors also related to the action of the court in the giving of certain instructions to the effect that a person is presumed to intend the natural and probable consequences of his own voluntary act, and that if the natural and probable consequences of the acts of the defendants in this case or any or either of them were to do the things condemned by statute and that such acts were done voluntarily by the defendants *then as a matter of law* it may be presumed that the defendants intended to do those things.

The evidence and the exact language of the offending instructions complained of is fully set out in the petition for the writ of certiorari and brief in support thereof filed in this case and need not be here repeated.

For the purpose of establishing an effective waiver of the errors referred to above, the case cited and relied upon by the respondent is the case of *Johnson* v. *United States*, reported in 318 United States, 189. The Johnson case is clearly distinguishable from the case at bar in this: That in the Johnson case there was an express waiver of the objection to the matters complained of, whereas in the case at bar there was no such waiver of the objections, either to the offending testimony (to which petitioners' objection was sustained) referred to in our Petition for Writ of Certiorari or to the instructions therein complained of. As a matter of fact, the Johnson case contains a true expression of the recognized principles herein involved, for the application of which to this case the petitioners contend.

We quote from the decision in the Johnson case as follows:

> "It is true that we may of our own motion notice errors to which no exception has been taken, if they would seriously affect the fairness, integrity, or public reputation of judicial proceedings (citing cases) but we are not dealing here with inadvertence or oversight. This is a case where silent approval of the course followed by the court is accompanied by an express waiver of a prior objection to the method by which the claim of privilege was treated. In such a situation the rule stated by Mr. Sutherland in *United States* v. *Manton*, 107 F. (2d) 834, 848, is applicable:
>
> 'If the failure to enter an exception or assign error had been a mere inadvertence, the matter might stand in a different light, but that view cannot be indulged. Plainly enough, counsel consciously and intentionally failed to save the point, and led the trial judge to understand that counsel was satisfied.' "

With respect to the attempted introduction in evidence of the prior prosecution against the petitioner Simon Levy, over fifteen years before the date of the present indict-

ment, and the entry of judgment on a plea of *nolo contendere* in that case, as set out fully on pages 2 and 3 of the Petition for Writ of Certiorari, it cannot be successfully contended that there was an express waiver of this error by the petitioner. There was in fact a vigorous objection to this testimony and although the court said, "I do not think it applies to this case" (see Record, page 280), the court nevertheless permitted the evidence to be introduced and then expressly *sustained* an objection of petitioners thereto (R. 280).

A reading of the transcript, we believe, will indicate that confusion existed in the mind of trial counsel as to the real state of the record concerning the admission in evidence of the remote former conviction on a plea of *nolo contendere*. This confusion no doubt was increased when the trial judge expressly repeated to trial counsel for petitioners that part of his charge relating to the effect the jury should give to such former conviction. The court said:

> "Here is the instruction as I gave it: (Reading) 'Evidence was introduced on behalf of the Government that the defendant, Simon L. Levy, was convicted of having violated the same statute with which he is charged with having violated in this case. He paid the penalty for that violation, and such evidence should be considered by you in this case for the sole purpose of determining the weight and credit to be given his testimony and as to his intent.'" (R. 417.)

Trial counsel's confusion as to the state of the record is shown by the colloquy which occurred between the court and such counsel after the court repeated the above portion of his charge to the jury (R. 417):

> "Mr. Royse: The only word I was questioning was the 'conviction.'
>
> The Court: Well, there might still be a conviction on a plea of *nolo contendere* and the court enter a finding of guilty, which would constitute a conviction.

Mr. Royse: There isn't an entry finding him guilty.

The Court: What word would you suggest that I use?

Mr. Royse: Your Honor, I may be dead wrong, but it just seems to me—

The Court: Well, if you have a different word that you want me to use, I will use it.

Mr. Royse: The use of the word 'conviction' infers that he was involved in some litigation or some dispute with the United States Government and raises a presumption which I don't think is supported by the evidence.

The Court: Just strike out the word 'conviction' and say that he was involved in a controversy in the Federal Court.

Mr. Royse: Thank you.

The Court: Is that satisfactory?

Mr. Royse: Yes, that is satisfactory, your Honor.

The Court: The record shows no exception to the instruction.

Mr. Royse: That is right, your Honor."

It thus appears that although the trial court had actually sustained the objection of petitioner's trial counsel to evidence of such former conviction his charge assumed that he had really admitted such prejudicially erroneous evidence and this fact might easily have added to the mental confusion of such counsel as to the actual state of the record. We respectfully submit that no express waiver of the errors complained of can be spelled out of the circumstances shown by the record on page 417 of the record. At most the waiver was inadvertent under the authority of the case of *Johnson* v. *United States*, 318 U. S. 189, cited and relied upon by the respondent. The failure of petitioners' counsel to continue his objections was excusable, and created the very condition under which the Court in that case declared that it was proper for this Court to take notice of such error. It seems to us that the situation was one calling for the protection of the rights of the defendants by the trial judge.

In this connection, we call attention to the case of *Glasser* v. *United States*, reported in 315 U. S. 60. In the Glasser case, the defendant, Glasser, was represented by counsel appointed by the court, being the same counsel appearing for a codefendant, Kretske. It appeared that there would be conflicting interests between the defendants Glasser and Kretske in the introduction of evidence, and this conflict was known to court and counsel for Glasser and Kretske. Glasser remained silent upon the appointment, and no objections or exceptions were made or preserved by either Glasser or the counsel appointed for him. This Court held in passing upon the case that there was error in the appointment of counsel for Glasser in this: That such counsel was not free to fully protect the interests of Glasser, by reason of his conflicting interest in Kretske, and although no objections were preserved anywhere in the record, it was the duty of this Court to correct the error and reverse the judgment, which was accordingly done.

What has been said about with respect to the errors in rulings of the court as to the admission of evidence regarding the former proceedings in the Chicago court some fifteen years earlier, and the court's instructions in relation thereto, apply with equal force to the instruction given by the court in the case as follows:

> "A person is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if you should find from the evidence beyond a 'reasonable doubt' that the natural and probable consequences of the acts of the defendants in this case, or any or either of them, were to do the things condemned by the statute, and that such acts were done voluntarily by the defendants, then, as a matter of law, it may be presumed that the defendants intended to do those things." (R. 414-415.)

As pointed out in our original petition for certiorari, this is the same instruction for which the judgment was reversed in the case of *Hibbard* v. *United States*, 172 Fed. 66. In the opinion of the court denying a petition for rehearing in that case, the court said:

> "Standing by itself, as an abstract proposition of law, the instruction is not erroneous. The error consists in applying it to a case wherein, apart from the intent, the act is colorless; color being thereby imparted, not to the intent by the color of the act, as the law implies, but to the act itself by the color borrowed for the intent. In cases like this where the act itself is, apart from the intent, colorless, the color of the intent must be proven as any other element of criminality is proven. The instruction as given (bearing in mind the case to which it was applied) though correct as an abstract proposition of law, tended to confuse the jury upon what, in this case, was the burden on the government, and thereby, in our judgment, prejudiced the plaintiff in error." (See Page 73.)

Little or no effort has been made by the respondent to justify the giving of this instruction, but respondent relies upon the failure to save the question with the technical nicety that is always desirable, but, we earnestly maintain, not indispensable, to protect the life or liberty of a citizen whose rights have been impaired through errors committed by the trial court.

From the opinion of the Court in the case of *Glasser* v. *United States* above cited, we quote as follows:

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. The error, which under some circumstances, would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." (Page 67.)

As evidence of the fact that this is just such a case, where the scales of justice were so delicately poised, we quote from the opinion of the Circuit Court of Appeals in this case, as follows:

> "We agree with the contention that much of the proof, even that offered by the government, is as consistent with defendants' good faith as with their intent to devise a scheme to defraud. This is especially true when it is considered that defendants were entitled to engage in a reasonable amount of what is sometimes termed as puffing or extolling the merits of their business and product." (R. 450.)

We respectfully request that a rehearing on the petition for certiorari be granted and that on such rehearing the writ of certiorari be issued as prayed in the petition.

EBEN LESH,
Huntington, Indiana,

WALTER BACHRACH,
231 South La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

JOSEPH H. LESH,
Huntington, Indiana,
Of Counsel.